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NO. 80-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TANKLINING CORPORATION
Petitioner,

v.

GALVESTON SHIPBUILDING CO.,
BREWER KMI, INC., AND
C. BREWER & CO., LTD.
Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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The Petitioner, Tanklining Corporation, respectfully requests permission to reply to the Respondent's Brief in Opposition as follows:

On page seven of Respondent's Brief in Opposition, it is stated:

> "A logical inference is that Galveston Shipbuilding *would have had to purchase at least the same amount of coatings* for Maritime Coating to do the job, as was contemplated by Petitioner originally. To make a fair comparison between contracts at trial, the value of coatings *to be purchased* was subtracted out of Petitioner's contract so that the true and comparable contract price of $291,555.00 was established."

This type of inference or speculation is exactly what is prohibited under Texas law.

Respondent, again, has basically admitted there was no evidence of actual expenditures for purchase of additional coating materials to complete the contract. Texas law required Respondent[1] to prove how much money was actually expended to complete the contract. *Nelson v. San Antonio Traction Co.*, 107 Tex. 180, 175 S.W. 434 (1915); also, *Hillyard v. Crabtree*, 11 Tex. 264 (Tex. Sup. Ct. 1854); *Gonzales College v. McHugh*, 21 Tex. 257 (Tex. Sup. Ct. 1858); *McKnight v. Renfro*, 371 S.W. 2nd 740 (Tex. Civ. App.—Dallas, 1963, writ ref'd n.r.e.).

The amount of expenses actually incurred, if any, to complete the contract were easily ascertainable and determinable to the penny. Respondent needed only to demonstrate the expenditures by means of invoices or payments made by its employees. The amount of expenditures cannot be determined by speculation or guess, but must be based on evidence from which the amount can

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1. In the Petition for Writ of Certiorari, page 8, Petitioner erroneously referred to "Petitioner" having the burden of proof of how much money was actually expended. The burden of proof was upon the Respondent in this matter.

be ascertained. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 LE 684 (1927); also, *Hetzel v. Baltimore and Ohio Railroad Co.*, 169 U.S. 26, 18 S.Ct. 255, 42 LE 643 (1898).

Respondent has brought suit against Maritime Coatings for failing to perform work on the barge in question in a good and workmanlike manner. Perhaps Maritime's failure to actually purchase the additional coating materials to complete the contract is the reason its work failed. Again, this is an example of the type of speculation which is not entitled to probative value in determining ultimate issues under Texas law or the majority of jurisdictions.

For the reasons stated above, as well as those stated in the Petition for Certiorari; Petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

Of Counsel:

/s/

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Reply to Brief in Opposition have been mailed by certified mail, return receipt requested, to all counsel of record on this 15th day of April, 1981.

/s/
ROBERT C. FLOYD